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In the Matter of

CELA

Aristotle International, Inc.

MUR 5625

GENERAL COUNSEL'S REPORT # 3

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5 **I. ACTIONS RECOMMENDED**

6 Find probable cause to believe Aristotle International, Inc. ("Aristotle") knowingly and
7 willfully violated 2 U.S.C. § 438(a)(4),

8
9 **II. BACKGROUND**

10 This matter concerns a knowing and willful violation of the commercial sale and use
11 provision of the Federal Election Campaign Act of 1971, as amended, ("the Act") and the
12 Commission's implementing regulation. 2 U.S.C. § 438(a)(4); 11 C.F.R. § 104.15. On
13 December 8, 2005, the Commission found reason to believe that Respondent, Aristotle
14 International, Inc., ("Aristotle") knowingly and willfully violated 2 U.S.C. § 438(a)(4) and
15 authorized an investigation based on information suggesting that Aristotle downloads
16 individual contributor information, specifically the individual's aggregate contribution history
17 to federal campaigns (hereinafter referred to as "FEC data") from the Commission's online
18 public records and provides the data through its product, Campaign Manager 5 ("CM-5"),
19 which Respondent describes as a "sophisticated campaign management software program for
20 campaign committees." See Reply Brief at 45. Beginning in April 2004, CM-5 contained a
21 feature designated the "Donations" tab, which users could access in order to obtain the
22 downloaded FEC data. Aristotle later renamed it the "Compliance/Vetting" feature (hereinafter
23 referred to as the "C/V feature") in August 2004. CM-5 is sold by contract to its customers.
24 Until September 25, 2009, the only way Aristotle's customers could access the FEC data

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1 through the C/V feature was by purchasing CM-5.¹ The information further suggested that
2 Aristotle marketed the C/V feature by explicitly touting its fundraising benefits, despite its
3 knowledge of the Commission's position that such activity would violate the sale and use
4 provision of the Act and the Commission's regulations. See Advisory Opinion 2004-24.
5 Aristotle's original promotional materials refer to the C/V feature and the FEC data contained
6 in it by noting the ability to compare how much contributors have given to other campaigns:
7 "When soliciting a contribution, Campaign Manager 5 will tell you exactly how much the
8 prospect has given to others, which suggests how much you should ask for. Never again leave
9 money on the table by asking for too little, or the wrong amount, from a qualified prospect."
10 See Complaint, at Exhibit 1, p. 2.

11 The factual record developed during the investigation shows that beginning April 1,
12 2004 through September 25, 2009, Aristotle sold FEC data exclusively through its software
13 product; and, that from April 1, 2004 through at least November 2, 2005, Aristotle marketed
14 the feature as a solicitation tool. Beginning in August 2004, Aristotle began incorporating
15 warnings to its customers regarding the restrictions on the sale and use of FEC data (hereinafter
16 referred to as "disclaimers") on some software product and materials related to the product.² It
17 was not until November 2, 2005, that all marketing materials contained the disclaimers.
18 See Attachment 1. Our investigation also revealed that the 2004 user manual for CM-5

¹ As of September 25, 2009, Aristotle posts the information for free on its website.

² Beginning in August 2004, Aristotle included the following warning on the software product and most, but not all, materials related to the product: "FEC DATA WARNING!!! Any information copied, or otherwise obtained, from any FEC report or statement, or any copy, reproduction, or publication thereof, filed under the Act, shall not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose, except that the name and address of any political committee may be used to solicit contributions from such committees." A PowerPoint presentation appearing on Aristotle's website in November 2005 contained a screen shot of the feature, without a disclaimer, next to the following language: "When soliciting a contribution, Campaign Manager 5 will tell you exactly how much the prospect has given to others, which suggests how much you should ask for." See Attachment 1.

1 highlighted the C/V feature of the software product stating, "Want to know how much to ask
2 from your prospects? FEC and state contributor lists are now fully integrated into the
3 Fundraising screens so you can know everything about your prospect's history of contributions
4 to others." The language in the user manual was not deleted until January 2005, which is after
5 Aristotle was notified of National Geographical & Political Software's ("NGP") complaint
6 filed in this matter. *Id.*

7 By letter dated June 11, 2009, we served the General Counsel's Brief ("GC Brief"),
8 incorporated herein by reference, to counsel representing Respondent. The GC Brief
9 recommends that the Commission find probable cause to believe Aristotle knowingly and
10 willfully violated 2 U.S.C. § 438(a)(4) based on two distinct theories of liability. Under the first
11 theory, Aristotle obtains FEC data from the Commission's online public records, and then sells
12 the data to its customers through the sale of CM-5. These actions constitute a *per se* commercial
13 purpose, and do not meet the regulatory exemption at 11 C.F.R. § 104.15(c) ("the media
14 exemption"), because Aristotle's software is not a communication similar to a newspaper,
15 magazine, or book and the principal purpose of inclusion of the data into its software upgrade is
16 for commercial purposes, *i.e.*, to sell its CM-5 software. The second theory is that Aristotle
17 intended for its customers to use the data for solicitation as shown by both the functioning of the
18 software, which provides its customers with an individual's aggregate contribution history
19 thereby making it possible for campaigns to ask a current or prospective donor for larger
20 donations based on their previous giving history to other campaigns, and its marketing of the
21 software and the language in its user manuals. This theory is further supported by the failure to
22 include disclaimers warning its customers of the restrictions on the sale and use of FEC data both

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internally on the product and externally on materials related to the product at the time the software was introduced.

On July 28, 2009, after granting Respondent's request for a twenty-seven day extension to file a response, Respondent submitted its Reply Brief, along with a request for a probable cause hearing, to the Commission. The Reply Brief argues that the C/V feature is not within the scope of Section 438(a)(4), because the feature itself is not sold to anyone, does not include the names and contact information of contributors, is intended for compliance purposes only, and disclaimers now appear internally on the product and externally on materials mentioning the feature. Respondent further argues that its inclusion of the FEC data in CM-5 is protected by the First Amendment and the Equal Protection Clause of the U.S. Constitution, as well as, recent MURs and Advisory Opinions permitting for-profit sale of FEC data by other entities, and that the Commission's advice to the regulated community regarding the scope of 2 U.S.C. § 438(a)(4) is ambiguous. In addition, Respondent argues that it has not committed a knowing and willful violation of the Act. Last, Respondent argues in its Reply Brief that the Commission should encourage innovations like the C/V feature. On February 17, 2010, Respondent submitted a Supplemental Reply Brief alleging that the complaint should be dismissed based on language in *Citizens United v. Federal Election Commission*, 558 U.S. ___, 130 S. Ct. ___ (Jan. 21, 2010) stating that "[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not." *Id.*, slip op. at 36. According to Respondent, 2 U.S.C. § 438(a)(4) and the media exemption regulation at 11 C.F.R. § 104.15(c) "distinguish media and non-media corporations by specifically exempting media corporations from 2 U.S.C. § 438(a)(4)'s prohibition on speech. Therefore, under the *Citizen United* analysis, the Commission may not impose this prohibition

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1 on non-media corporations like Aristotle." Supplemental Reply Brief at 6. On August 5, 2009,
2 the Commission approved the hearing request. On September 23, 2009, a probable cause
3 hearing was held in accordance with the Commission's policy published at 72 Fed. Reg. 64919
4 (Nov. 19, 2007). In response to Commissioners' questions, counsel for Respondent stated,
5 among other things, that the initial marketing of the C/V feature was a "mistake." See MUR
6 5625 PC Hearing Transcript at 6 and 24-25. Counsel also stated that the only way a committee
7 obtained access to the FEC data in the C/V feature was through a commercial sale or commercial
8 use. *Id.* at 19.

9 As discussed below, the Reply Brief, Supplemental Reply Brief, and the information
10 obtained during the probable cause hearing fail to rebut the evidence set forth in the GC Brief
11 establishing that Aristotle sold the FEC data in contravention of the Act and the Commission
12 regulations, and that it explicitly marketed the software feature as a solicitation tool.

13 Accordingly, we recommend that the Commission find that Aristotle International, Inc.
14 knowingly and willfully violated 2 U.S.C. § 438(a)(4) _____
15 _____

16 **III. ANALYSIS**

17 **A. Aristotle International, Inc.'s Commercial Sale and Use of** 18 **Individual Contributor Information Copied from Commission Sources** 19 **Violates 2 U.S.C. § 438(a)(4)** 20

21 The commercial use and sale provision at 2 U.S.C. § 438(a)(4) sets forth the
22 Commission's duty to make public the reports and statements filed with it for copying and
23 inspection by the public, with the exception that any information copied from the reports or
24 statements may not be sold or used by *any person* for the purpose of soliciting contributions or
25 for commercial purposes:

...within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection, and copying, at the expense of the person requesting such copying, *except that any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes*, other than using the name and address of any political committee to solicit contributions from such committee. (emphasis added). *Id.*

2 U.S.C. § 438(a)(4).

The Commission promulgated regulation 11 C.F.R. § 104.15 to implement the statutory prohibition. Part (a) of the regulation prohibits "any person" from selling or using FEC data for soliciting contributions or for commercial purposes. 11 C.F.R. 104.15(a). Part (b) of the regulation clarifies the term "soliciting contributions" as to include soliciting any type of contribution or donation, such as political or charitable contributions. Part (c) of the regulation, exempts the use of the FEC data in news media and books from the statutory prohibition when certain conditions are present. 11 C.F.R. § 104.15(c). The regulation states "the use of information, which is copied or otherwise obtained from reports filed under 11 C.F.R. part 104, in newspapers, magazines, books or other similar communications is permissible as long as the principal purpose of such communications is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes." *Id.* The regulatory exemption is referred to as the "media exemption" and it calls for a two pronged test to decide whether FEC information is sold or used for commercial solicitation or any purpose: first, whether the communication is similar to a newspaper, magazine or book, and second, whether the principal purpose of the communication is for other than soliciting contributions or for other commercial purposes. *FEC v. Political Contributions Data, Inc.*, 943 F.2d 190, 195 (2nd Cir. 1991).

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1 Aristotle's principal arguments are that its C/V feature does not violate the Act or the
2 Commission's implementing regulation because the feature is designed so that it could not be
3 easily used as a prospecting or list-making tool, the feature does not provide the names and
4 addresses from FEC sources, the disclaimers now appear on the product and on materials related
5 to the product, and Aristotle meant for its customers to use the FEC data for compliance
6 purposes only. See Reply Brief at 13-18. Respondent does not claim to be a media entity, nor
7 does it claim that its activities are exempt from the prohibition based on the media exemption at
8 11 C.F.R. 104.15(c). Probable Cause Hearing Tr. at 27.

9 Respondent's arguments are premised on its selective reading of *Federal Election*
10 *Commission v. Political Contributions Data, Inc.*, 943 F.2d 190 (2nd Cir. 1991), and its
11 avoidance of the court decisions in *Federal Election Commission v. International Funding*
12 *Institute*, 969 F.2d 1110 (D.C. Cir. 1992) and *Federal Election Commission v. Legi-Tech, Inc.*,
13 523 F. Supp. 523 (D.D.C. 1997). The *Legi-Tech* court concluded that the "sale or use"
14 prohibition set forth in Section 438(a)(4) applies to any individual or organization that uses
15 information obtained from FEC reports as part of a commercial sale. See *Legi-Tech*, at 530
16 ("[t]he exception [to 2 U.S.C. § 438(a)(4)] is where the principal purpose of the use of this
17 information is the solicitation of contributions or the commercial sale of the information
18 itself")(emphasis added). Moreover, Aristotle's arguments disregard the "media exemption" set
19 forth in the Commission's regulation at 11 C.F.R. § 104.15(c) and essentially ask the
20 Commission to create a vague and unsupported compliance exemption.

21 Aristotle's sales of the FEC data were for a commercial purpose within the meaning of
22 the Act, because it initially sold the software product with explicit instructions on how to use the
23 C/V feature as a solicitation tool, and until September 25, 2009 the only way its customers could

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1 get access to the FEC data in the C/V feature was by purchasing the software product.
2 Moreover, Aristotle's C/V feature is not similar to a newspaper, book or magazine, within the
3 meaning of Part (c) the regulation, rather it is a campaign management software program with
4 fundraising features, and therefore is not exempt from the statute. In addition, the restriction on
5 the commercial sale and use of FEC data as set forth in the statute and the Commission's
6 implementing regulation is constitutional on its face and as applied to the facts of this matter.
7 The statute is no broader than necessary to protect the important governmental interests of
8 promoting disclosure of campaign contribution information while not chilling the protected
9 speech of third parties. The regulation is rationally related to the purpose of the statute, and
10 accommodates the competing interest of promoting disclosure of campaign contribution
11 information with the protection of private citizens' privacy and the property interest of the
12 political committees. Moreover, the statute and regulation as applied to the facts in this matter
13 do not violate the Equal Protection Clause of the Fifth Amendment, because Respondent has not
14 demonstrated that similarly situated individuals are being treated differently and that the
15 differential treatment is not justified. Respondent ignores key facts of the other enforcement
16 cases to which it cites, including the fact that other respondents' activities did not include the
17 sale of FEC data to customers. . Last, the Respondent's constitutional challenge also fails
18 because the broad language in *Citizens United* cited by Respondent in its Supplemental Reply
19 Brief, does not address 2 U.S.C. § 438(a)(4) or the Commission's implementing regulation
20 specifically and the analysis of *Citizens United* applies a different standard of scrutiny than
21 would be applied to restrictions on the use of FEC data for commercial purposes. We address
22 these issues more fully below.

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1. The Commercial Sale and Use Provision at 2 U.S.C. § 438(a)(4) Applies to Any Contributor Information Derived from Commission Sources

The language of the statute is clear and addresses two distinct uses of Commission data:

(1) for the purpose of soliciting contributions, or (2) for commercial purposes. 2 U.S.C.

§ 438(a)(4). Both the courts and the legislative history have touched on one or both aspects.

Respondent, through counsel, has stated that the feature was used for commercial purposes.

See MUR 5625 Probable Cause Hearing Transcript at 18-20. Respondent also believes that the C/V feature demonstrates the software company's "technological prowess." *Id.* at 37.

Nevertheless, Aristotle argues that Section 438(a)(4) has consistently been interpreted by the courts to be limited to sale or use of contributor names and contact information for prospecting purposes. Aristotle further argues that because it does not provide the names and addresses of contributors, "[t]he compliance/vetting feature does not have the potential to cause the harassment of any contributor or the invasion of a contributor's privacy." Reply Brief at 50 and at 20 citing to 117 Cong. Rec. 30057 (daily ed., Aug. 5, 1971) reprinted in Legislative History of the Federal Election Campaign Act of 1971, at 581(1981).

While the cases in this area of the law have generally arisen in the context of contributor names and addresses, the commercial sale of contributor information is not limited to names and addresses, but includes any contributor information. See 2 U.S.C. § 438(a)(4) and 11 C.F.R. § 104.15. Moreover, the more recent case law has explained that the term "commercial use" includes not only commercial solicitation, but also the commercial sale of the information. See *Federal Election Comm'n v. Legi-Tech, Inc.*, 967 F. Supp. 523, 530 (D.D.C. 1997).

Respondent argues that the term "or for commercial purposes" as set forth in the statute is ambiguous. Respondent contends that, according to the legislative history of the statute and the case law, the term does not mean that FEC data can never be sold. Rather, Respondent argues

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1 that the term means that the sale or use of contributor names and contact information for
2 prospecting purposes is prohibited. *See* Reply Brief at 20-21 and 55. The primary legal support
3 cited by Respondent for the proposition that the commercial use restriction is ambiguous is *FEC*
4 *v. Political Contributions Data*, 943 F.2d 190 (2nd Cir. 1991). In *PCD*, the Second Circuit
5 overturned the District Court for the Southern District of New York by finding PCD's use of
6 FEC data permissible. The court's decision also directly overruled AO 1986-25 in which the
7 Commission determined that PCD's use of FEC data was commercial and therefore barred by
8 the Act. PCD collected FEC data and sorted the data by congressional district and by employer
9 and sold the lists to the public to "show how financial contributions support the current political
10 superstructure, particularly with respect to the advantage enjoyed by incumbents over
11 challengers" and to "facilitate research into the reason why contributors, both as individuals and
12 on behalf of their affiliated companies, favor one candidate or another, particularly in light of
13 their congressional committee assignments." *PCD* at 193. Aristotle also cites this case for the
14 proposition that the absence of contributor contact information and the inclusion of disclaimers
15 places the sale of the Commission data outside the scope of the scope of Section 2 U.S.C.
16 § 438(a)(4). *See* Reply Brief at 21. However, Aristotle ignores the basis for the Second
17 Circuit's holding, i.e., that PCD's use of the data was similar to a newspaper, book or magazine
18 -- although not traditional media, it was close to being a purveyor of news. *PCD* at 196. The
19 court noted that the lack of mailing addresses and phone numbers made it certain that the
20 reports will be used for informative purposes, further placing PCD's reports within the media
21 exemption. "Since none of PCD's publications is of the type that could infringe on the
22 contributors' privacy interests, the publications at issue may be sold without violating

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1 § 438(a)(4) of the FECA." *PCD*, 943 F.2d at 198. Thus, the *PCD* court's holding applied the
2 media exemption, rather than relying on any purported ambiguity in the Act.

3 Aristotle also ignores the criticism of the *PCD* decision by the court in *Legi-Tech*: "[i]n
4 attempting to avoid the constitutionality issue, the Political Contributions Data court read the
5 phrase "or for commercial purposes" out of the statute. *Legi-Tech, supra* at 531. "Giving effect
6 to only the solicitation component of Congress's proscription on solicitation or commercial use
7 would not protect all of the substantial interests that Congress identified, such as the political
8 parties' intellectual property interest." *Id.*, at 534.

9 In *Legi-Tech, supra*, the United States District Court for the District of Columbia granted
10 the Commission's motion for summary judgment, finding that the sale of subscriptions to the
11 Campaign Contribution Tracking System (CCTS) violated the commercial use provision of
12 Section 438(a)(4). *Legi-Tech* sold subscribers lists of donors from FEC data specifically so that
13 *Legi-Tech*'s customers could solicit those donors. Thus, *Legi-Tech* clearly violated both the
14 intent and the text of the Act. With respect to the solicitation theory, the *Legi-Tech* court cites a
15 use similar to the use alleged by the complainant, NGP, in the instant case as a violation of the
16 Act. "The Teamsters used the CCTS to monitor contributions by its membership and, when it
17 perceived 'the possibility of getting more contributions' from certain of its members, it would
18 solicit contributions from those members." *Id.* at 526-527. This also closely matches the
19 purpose of the C/V feature as described in Aristotle's original marketing material.

20 There are two additional published cases interpreting Section 438(a)(4). In the earliest
21 case, the court found that defendants who sold mailing lists based on FEC tapes containing the
22 names of donors violated the Act. *FEC v. American Int'l Demographic Serv., Inc.*, 629 F. Supp.
23 317 (E.D.Va. 1986). In 1992, the United States Court of Appeals for the District of Columbia

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1 Circuit, sat en banc to hear a challenge to the constitutionality of Section 438(a)(4). *FEC v. Int'l*
2 *Funding Institute*, 969 F.2d 1110, (D.C.Cir. 1992). The court held that the statute was not
3 subject to strict scrutiny and that it did not violate the First Amendment on its face or as applied.

4 While the *American Int'l Demographic Serv., Inc.* and *IFI* cases dealt primarily with the
5 sale of contributor lists consisting of names and/or contact information of contributors, these
6 cases support our recommendations in this matter. Although the nature of the FEC data being
7 sold is different, *i.e.*, names and addresses versus contribution histories, Aristotle's actions in
8 copying FEC data and then selling it to customers is similar to the acts of the defendants in these
9 cases. It was the information itself that Aristotle was selling, and therefore, its replication of the
10 information in its software product was the primary focus of its activity. *See Legi-Tech*, at 530
11 (Despite the fact that Legi-Tech's parent corporation was a diversified media company, it was
12 Legi-Tech's actions which failed to meet the media exemption at 11 C.F.R. § 104.15(c), in
13 part, because it provided subscribers with information copied directly from reports filed with the
14 Commission; Legi-Tech's sale of the contributor information itself, rather than educating the
15 public, was the primary focus of its activity). Furthermore, given that Aristotle's customers have
16 the identifying information of the contributor in its own database, the chances that a contributor
17 would be solicited or re-solicited for a contribution are increased by using the FEC data. A
18 contributor giving a modest amount could be targeted for additional funds. As stated in
19 Aristotle's marketing materials, "Never again leave money on the table by asking for too little, or
20 the wrong amount from a qualified prospect." *See Complaint*, at Exhibit 1.

21 Aristotle's arguments are factually flawed as well. It argues that as designed the C/V
22 feature does not have list-making capabilities, and therefore, does not enhance solicitation of
23 contributors. *See Reply Brief* at 11 and 18; *see also* MUR 5625 Probable Cause Hearing

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1 Transcript at 21. However, the C/V feature does enhance a customer's ability to solicit
2 contributors, and therefore infringes on a contributor's privacy interests, because the contribution
3 histories are matched with the names and addresses input by the customer. The customer can
4 then use the Commission's data to harass prospective donors by soliciting those who have given
5 more to other campaigns, not just their existing donors. This is precisely the activity proscribed
6 by 2 U.S.C. § 438(a)(4); *see also* 117 Cong. Rec. 30057 (daily ed., Aug. 5, 1971) *reprinted in*
7 *Legislative History of the Federal Election Campaign Act of 1971*, at 581(1981).

8 Respondent's narrow focus on their product's lack of list making ability is also
9 unwarranted. Neither the statute nor the regulation contain, much less define, the term list
10 broker. Moreover, the commercial sale and use prohibition does not distinguish between types
11 of individual contributor information, only between political committee information and
12 individual contributor information: "... any information copied from such reports or statements
13 may not be sold or used by any person for the purpose of soliciting contributions or for
14 commercial purposes, other than using the name and address of any political committee to solicit
15 contributions from such committee." (emphasis added) 2 U.S.C. § 438(a)(4); *see also* 11 C.F.R.
16 § 104.15(a). Nor has the Commission differentiated between different types of contributor
17 information (e.g., names and addresses versus contribution histories). AO 1980-78 (Richardson)
18 and AO 1980-101 (Weinberger)(campaign solicitations referencing political committee
19 information -- not individual contributor information -- derived from FEC reports permissible);
20 *see also* AO 1989-19 (Johnson)(Commission draws a distinction between political committee
21 contribution information and individual contribution information -- proposed sale of copies of
22 pages from Receipt and Disbursement Reports containing only contributions from other political
23 committees permissible); AO 1995-09 (NewtWatch)(Commission approved request to make

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1 limited contributor information obtained from FEC sources available to the public on requestor's
2 website for free. The information would be available at no cost, and thus, was not clearly for a
3 commercial purpose. In addition, the proposed lists did not contain sufficient information on the
4 individuals to generate solicitations.) In sum, Aristotle provides no principled basis for
5 distinguishing its sale of the contribution histories from the sale of the names and addresses.

6 **2. Aristotle Sold FEC Data Through the C/V Feature of CM-5 for**
7 **Commercial Purposes Within the Meaning of the Statute and Regulation**

8
9 Respondent argues that it does not sell FEC data because when the C/V feature was first
10 included in CM-5, the cost of the software product was not increased. Reply Brief at 45. This
11 argument fails because the only way Aristotle made the FEC data available to its customers was
12 through their purchase of CM-5 until September 25, 2009. In other words, its customers had to
13 purchase CM-5 to access the FEC data. Moreover, the nature of Aristotle's business is a
14 commercial enterprise that produces computer software for the management of political
15 campaigns, including increasing their fundraising effectiveness. As described in its Reply Brief,
16 "...Aristotle provides committees with tools to *gain an advantage in campaigns* while making it
17 easier for them to comply with the Commission's regulations." Reply Brief at 62-63 (emphasis
18 added).

19 Aristotle's argument that it did not sell the FEC data, or that the FEC data is "incidental"
20 to its sale of its software is also inconsistent with its initial marketing strategy. When CM-5 was
21 first launched, one of the main selling points of the upgrade was the customer's ability to access
22 a contributor's aggregate donor history through the C/V feature for the purpose of fundraising, or
23 as explicitly stated in the marketing materials to get customers to purchase its upgrade: "Reason
24 #1: Raise More Money." See GC Brief at 7-9; Complaint, at Exhibit 1. In addition, the

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1 PowerPoint presentation on Aristotle's website continued to tout CM-5 as a fundraising tool until
2 November 2005 (more than 18 months after CM-5 was first launched in April 2004).
3 See Attachment 1. Respondent acknowledges that the C/V feature was used to show off its new
4 CM-5 product. See MUR 5625 Probable Cause Hearing Transcript at 37. Moreover,
5 Respondent's senior management expected that the C/V feature would give new customers a
6 reason to purchase CM-5. See Reply Brief at 12, and at Attachment A, D. Phillips Affidavit at
7 ¶ 27. Respondent acknowledges that the initial marketing, to the extent to which it touted the
8 new C/V feature as a solicitation tool was a "mistake" and that those statements regarding
9 solicitation in the marketing materials had not been reviewed by counsel. See MUR 5625
10 Probable Cause Hearing Transcript at 6-7, 24-25; see also Reply Brief at 60, and at Attachment
11 A, D. Phillips Affidavit at ¶ 26.

12 Respondent also argues that the term "commercial use" should only apply to situations
13 involving commercial solicitation, in which a list of names for potential solicitation is created, as
14 interpreted by the court in *PCD, supra*. Reply Brief at 21-23. Even under Respondent's narrow
15 interpretation of the term "commercial use," its own activities are prohibited by the statute, given
16 its admission that the feature can be used for solicitation purposes, even with the added
17 disclaimers. See MUR 5625 Probable Cause Hearing Transcript, at 24 -25.

18 As set forth in the GC Brief, the lack of disclaimers on the software product and materials
19 related to the product is further evidence that the intended principal purpose of the feature is to
20 facilitate solicitation, as stated in its marketing materials, not compliance.³ GC Brief at 9-14.
21 The lack of disclaimers strongly suggests that FEC data was being sold to facilitate fundraising

³ Respondent misconstrues the argument in the GC Brief as asserting a separate violation for the lack of initial disclaimers. The lack of disclaimers is not a violation itself, but rather further proof of the C/V feature's original and true purpose – solicitation.

1 from existing donors, as well as from prospective donors. The contracts to purchase CM-5
2 lacked a disclaimer specific to the prohibitions on the sale and use of FEC data until at least
3 August 2004, and in some instances as late as February 2005. GC Brief at 11-12. Given that the
4 C/V feature was the main thrust of Respondents advertising of CM-5, and that the feature was
5 used to entice customers to purchase the upgrade, appropriate clear warnings from the start
6 would have helped demonstrate that the feature was not intended as a solicitation tool as
7 Respondent alleges.

8 Moreover, lack of warnings has no bearing on whether Aristotle's sale of FEC data
9 constituted a commercial use. The statute does not permit the commercial sale or use of
10 contributor information whether or not it is accompanied by a disclaimer stating the statute's sale
11 or use restriction. The courts though have considered the presence of disclaimers in determining
12 whether the communication would likely be used to solicit contributions. *See PCD, supra*, and
13 *Legi-Tech, supra*. Since the C/V feature failed to include disclaimers for the first four months it
14 was launched to the public, and the evidence demonstrates that Respondent sold the data with
15 explicit instructions on how to use the FEC data for solicitation, the facts of this matter are in
16 contrast to the facts of the case upon which Aristotle primarily relies, e.g., *PCD*, discussed *supra*
17 at Section III.A.1 (disclaimers appeared on PCD's communication initially and there was no
18 evidence that PCD marketed its communication as a solicitation tool).

19 Respondent maintains that its inclusion of the FEC data in the C/V feature of its software is
20 for compliance purposes. Respondent's arguments that the C/V feature is for compliance purposes
21 only and that it deters harassment because it does not copy contact information from Commission
22 sources is flawed for various reasons.

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1 From the outset, Aristotle's purported compliance purpose was in direct contradiction to
2 its initial promotional materials and 2004 user manual, which specify how campaigns can use the
3 FEC data to solicit contributions from contributors by noting how much they gave to other
4 campaigns, and with the failure to include disclaimers on the product and related materials at the
5 time the software was introduced. The 2004 User Manual highlighted the new feature as
6 follows: "Want to know how much to ask for from your prospects? FEC and state contribution
7 lists are now fully integrated into the Fundraising screens so you can know everything about
8 your prospect's history of contributions to others." Unlike its claims that its marketing of the
9 feature as a solicitation tool was limited to only four months, in actuality the marketing
10 continued from April 2004 through November 2005, as evidenced by a PowerPoint presentation
11 appearing on its website on November 2, 2005. See Attachment 1 ("Reason #1: Raise More
12 Money").

13 The evidence shows that C/V feature was intended to allow customers to use FEC data to
14 enhance their ability to solicit contributions from prospects, as well as from existing donors,
15 which is precisely the type of activity 2 U.S.C. § 438(a)(4) seeks to prevent. GC Brief at 13 -14.
16 According to Respondent, the feature can still be used for solicitation purposes, even with the
17 presence of disclaimers on the screen. See MUR 5625 Probable Cause Hearing Transcript at
18 24-26.

19 Furthermore, while Aristotle's marketing materials and 2004 user manual highlighted
20 how to use the C/V feature as a solicitation tool, the revised marketing materials and user manual
21 do not provide the same level of detail to its customers on how to use the information for
22 compliance purposes. See Reply Brief at Attachment C, February 2005 User Manual ("FEC
23 Compliance Note: Campaign Manager 5 makes a very limited subset of FEC information

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1 available for compliance purposes only, such as insuring against accepting excessive or illegal
2 contributions. The data may also be used to refuse or reject contributions from donors who give
3 to those with whom you may not wish to be associated").

4 Respondent's contention that the C/V feature was intended for compliance purposes is
5 further undercut in two ways. First, contributions made to state campaigns are fed through the
6 feature. When a customer inputs the name and address of a targeted contributor into the C/V
7 feature, all federal, state and PAC aggregate contribution histories are displayed simultaneously.
8 See Complaint at Exhibit 1. Given that some states do not have limitations on amounts donated
9 by individuals to state campaigns, an individual's contribution history to some state campaigns
10 would not be used for compliance purposes, as there are no limits to check. Second, the names
11 and addresses of potential contributors (from lists the committee purchased), not necessarily
12 contributors who have already donated to a campaign, can be searched through the feature. See
13 MUR 5625 Probable Cause Hearing Transcript at 10-11, 22, 30. Therefore, it is less likely that a
14 federal political committee would use the C/V feature to obtain a potential contributor's
15 contribution history for compliance purposes, because the individual has not yet donated to the
16 campaign. Rather, a potential contributor's contribution history to other federal campaigns
17 would more likely be used for solicitation purposes, as Respondent expressly advertised in its
18 early marketing materials and original user manual. See Complaint, at Exhibit 1, p. 2; see also
19 2004 Campaign Manager 5 User Guide, at 16.

20 The only explanation Aristotle gives for how the FEC data might be used for its
21 purported compliance purposes is the possibility of checking donors' aggregate contributions:
22 "information about a particular, existing donor's aggregate contributions to all federal political
23 committees is extremely useful in avoiding receipt of illegal or excessive contributions from

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1 donors who have reached their aggregate election cycle contribution limits under 2 U.S.C.
2 § 441a(a).” Reply Brief at page 11, note 5. All donations that recipient campaigns receive
3 should be recorded in the campaign’s database, thus a campaign would have no need to use FEC
4 data to determine whether a donor has exceeded the contribution limit to that particular
5 campaign. Therefore, Aristotle’s purported compliance purpose is more likely in reference to the
6 individual biennial limit. See 2 U.S.C. §§ 441a(a)(3). A contributor, however, is responsible for
7 staying within the appropriate contributions limits under the Act, and should be aware of his or
8 her own donation history. See 2 U.S.C. §§ 441a(a)(1) and (3). Thus, the individual should be
9 primarily responsible for checking that he or she is not over the biennial limit.⁴

10 Enforcement matters involving violations by campaign committees for the receipt of
11 individual biennial contribution limits, Section 441a(a)(3), rarely arise. When such a violation is
12 noted, it has principally been in the “family contribution” context (*see, e.g.*, MURs
13 5321(Minnesotans for Janet Robert), MUR 5453 (Giordano for US Senate), MUR 5685
14 (Turnham for Congress) and MUR 5138 (Ferguson for Congress) where the excessive
15 contribution results from a single contribution from an individual. This feature would do nothing
16 to prevent this type of violation. On its face, the contribution check would establish that the
17 biennial limit had been exceeded. Given the large size of the individual aggregate biennial limit,
18 it is not surprising that such violations are so rare that the benefit of this upgrade for compliance
19 purposes is minimal. Similarly, the Reply Brief provides no explanation as to how the C/V
20 feature aides campaigns in avoiding receipt of illegal contributions. Evidence of illegality of a
21 contribution would appear on the face of the check and therefore the campaign treasurer would

⁴ The biennial limit is indexed for inflation in odd-numbered years. The 2009-10 limit is \$115,500. This limit includes up to: \$45,600 in contributions to candidate committees, and \$69,900 in contributions to any other committees, of which no more than \$45,600 of this amount may be given to committees that are not national party committees. See 11 C.F.R. § 110.5(b)(1).

1 presumably know by examining the check that it is an illegal contribution, e.g., contributions
2 from corporate treasuries, and would not require computer software. See 11 C.F.R. § 103.3(b).

3 The only evidence available on how the feature is being used by its customers, is the
4 tracking performed by Aristotle between November 8, 2007 and October 22, 2008. See Reply
5 Brief at Attachment A, D. Phillips Affidavit at ¶ 30. According to Aristotle, only three
6 committees were tracked using the feature, and no explanation is provided as to how those
7 customers used the feature. See MUR 5625 Probable Cause Hearing Transcript at 7-8. While
8 the feature was disabled from October 22, 2008 until July 2009, Aristotle received no inquiries
9 as to why it was not functioning. See Reply Brief at Attachment A, D. Phillips Affidavit at ¶ 31.
10 The scarcity of use of the feature by its customers further undercuts Aristotle's argument that the
11 feature is an important compliance tool.

12 **3. Respondent's Commercial Sale of FEC data is not Protected by the**
13 **"Media Exemption" at 11 C.F.R. § 104.15(c), and Therefore is not**
14 **Exempt from the Statute**
15

16 The Commission's regulations articulate an exception for the use of FEC data in
17 "newspapers, magazines, books or other similar communications ... as long as the principal
18 purpose of such communications is not to communicate any contributor information listed on
19 such reports for the purpose of soliciting contributions or for other commercial purposes."
20 11 C.F.R. § 104.15(c).

21 The first prong of the "media exemption" is not met because Aristotle's CM-5 software
22 product is not akin to a newspaper, book, or magazine, nor is it akin to an online news
23 information service. See 11 C.F.R. § 104.15(c). The CM-5 software product is a campaign
24 management software program with fundraising features, including the C/V feature. See Reply
25 Brief at 45 and 63. CM-5 was marketed as a software product which will enhance political

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1 committees' fundraising capabilities, thereby gaining an advantage over other campaigns. Reply
2 Brief at 62. The C/V feature gave customers a new reason to purchase CM-5, and the feature
3 was highlighted in the initial marketing materials. See Complaint, at Exhibit 1, ("5 Reasons Why
4 Campaigns Choose Campaign Manager 5," "Reason #1: Raise More Money"); See 2004
5 Campaign Manager 5 User Guide, at 16 ("Want to know how much to ask for from your
6 prospects? FEC and state contributor lists are now fully integrated into the Fundraising screens
7 so you can know everything about your prospect's history of contribution to others.").
8 Moreover, Aristotle is not arguing that it is a media entity. See MUR 5625 Probable Cause
9 Hearing Transcript at 27.

10 Nor is the second prong of the exemption met, because, as discussed *supra*, Aristotle's
11 initial marketing of the product and initial failure to warn customers about the restrictions on the
12 sale and use of FEC data establish that the principal purpose of the incorporation of the FEC data
13 into CM-5's C/V feature is to solicit contributions.

14 The key point is that the C/V feature is not designed to inform the public. Unlike MUR
15 5155 (TRKC, Inc.), the C/V feature was sold, not made available to the public without charge
16 until September 25, 2009. Furthermore, TRKC is an Internet news and tracking service,
17 whereas, CM-5 is a campaign management software product designed to increase the fundraising
18 effectiveness of its customers. Similarly, MURs 6065 (PoliticalBase.com) and 6053 (Huffington
19 Post.com) are distinguishable because they are news and opinion websites which provided the
20 contributor information for free to the public. In *PCD*, *supra* the court equated a "similar
21 communication" to a newspaper, book, or magazine as a communication that furthers debate on
22 public issues. See *PCD*, at 195. As a campaign management software product designed to

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1 increase the fundraising effectiveness of its customers, CM-5 is not a communication similar to a
2 newspaper, book, or magazine as defined by the regulation or the courts. *See id.*

3 **B. The Commission's Advice to the Regulated Community Regarding the**
4 **Commercial Sale and Use Provision Has Been Clear and Unambiguous**

5
6 **1. Advisory Opinion 2004-24**

7 The Commission's opinion in 2004-24 is important to the determination of this matter,
8 because it stands for the proposition that the inclusion of historical contribution data for
9 individual donors taken from the FEC's Web site and incorporated into a campaign management
10 software upgrade sold to political committees would be prohibited under the Act's restriction on
11 the sale or use of such contributor information. *See* AO 2004-24. Respondent argues that the
12 General Counsel's Reliance on AO 2004-24 is misplaced. However, Respondent's argument
13 overlooks the crucial fact that Aristotle conducts activity identical to the activity in AO 2004-24,
14 *i.e.*, collecting contributor information from the Commission's public records and including it as
15 part of a software upgrade sold to customers. NGP and Aristotle are two leading campaign
16 software producers and are fierce competitors in the campaign software industry. On June 10,
17 2004, NGP requested an advisory opinion from the Commission regarding a potential upgrade to
18 their campaign software. NGP proposed to "offer our clients the ability to automatically see the
19 contributions that their donors have made to other candidates, PACs and party organizations."
20 AO Request at 1. This feature would allow campaigns to ask their own donors for the maximum
21 amount of money that the donor has given to other campaigns in the past.

22 Respondent attempts to distinguish AO 2004-24 from the facts of this matter based on its
23 software configuration (e.g., that list-making is not possible with the C/V feature). *See* Reply
24 Brief at 48. Contrary to Respondent's assertions, even though its software does not enable list-

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1 making, the C/V feature had, and has, the capability of subjecting individual contributors who
2 have not yet contributed the maximum permissible amounts to the invasion of privacy and
3 harassment of targeted solicitations for specific amounts of money, based on information
4 obtained from FEC public records and accessed through software sold by Aristotle, precisely the
5 circumstance that 2 U.S.C. § 438(a)(4) was designed to prevent. See discussion, *supra*, at 7, 12 -
6 13. As the Commission set forth in AO 2004-24, "the purpose of restricting the sale or use of
7 information obtained from FEC reports is to protect contributors from having their names sold or
8 used for commercial purposes..." (emphasis added). AO 2004-24 at 2.

9 In AO 2004-24, the Commission found that these circumstances constitute a commercial
10 use and that commercial uses of FEC data are prohibited. *Id.* This reasoning applies regardless
11 of whether the customer uses the data for solicitation purposes. Because the factual
12 circumstances here are materially indistinguishable from those presented in AO 2004-24, the
13 Commission should apply the same reasoning to evaluate Aristotle's activity.

14 The Commission opined that because NGP intended to obtain information from the
15 FEC's online public records and include the information in a software upgrade, such a use would
16 be commercial and thus barred both by the pertinent statute and regulation. AO 2004-24, at 3.
17 However, the wording of this section of the AO was changed from the original draft language,
18 which included the following sentence: "Such use is for a commercial purpose because NGP is a
19 for-profit company that sells and services NGP Campaign Office for a profit." Draft AO at 4.
20 By contrast, in the final version of the AO, the sentence is truncated to read simply: "Such use is
21 for a commercial purpose." Respondent argues that this language change supports their position,
22 because a for-profit company can permissibly use the FEC data. This is incorrect. The language
23 change instead made it clear that the advisory opinion's reasoning was not limited to for-profit

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1 companies, and did not change the basic proposition that the inclusion of the data into a software
2 upgrade constitutes a commercial use. It is irrelevant whether an entity is a for-profit
3 organization, because even a non-profit organization might violate the Act if it uses the data for a
4 commercial purpose.

5 In an attempt to distinguish its sale and use of contributor information from NGP's
6 proposal, Aristotle argues that it has provided the FEC data for "lawful compliance purposes."
7 Reply Brief at 48-49. This distinction is immaterial though since the Commission determined in
8 AO 2004-24 that commercial sale of a software upgrade that includes FEC data constitutes a
9 commercial use of FEC data, regardless of its ultimate purpose.

10 **C. Section 438(a)(4) Does Not Violate Respondent's First Amendment Freedom**
11 **of Speech Rights or Its Customer's Freedom of Association Rights**

12 Respondent contends that the enforcement of the commercial use and sale restriction
13 violates its First Amendment freedom of speech rights by prohibiting the limited publication of
14 contributor information. Reply Brief at 50. Respondent further maintains that "[t]he campaign's
15 freedom of association under the First Amendment is also impacted if they are not allowed to use
16 the contribution information for vetting to determine whether to associate with a particular
17 candidate." Reply Brief at 50, note 19. Respondent argues that the C/V feature deters
18 corruption. Specifically, the Reply Brief states: "[t]he information in the compliance/vetting
19 feature 'deters actual corruption' by limiting the possibility of an excessive contribution by a
20 contributor and 'the appearance of corruption' by the candidate for accepting an excessive
21 contribution." Reply Brief at 51, citing *Buckley v. Valeo*, 424 U.S. 1, 67 (1976). "Accordingly,
22 applying the prohibition of 2 U.S.C. § 438(a)(4) to Aristotle's dissemination of contribution
23 information by the compliance/vetting feature contravenes Congress' stated purposes for making
24 the information available and is therefore unconstitutional." *Id.* Last, Respondent argues that
25

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1 "[b]ecause the compliance/vetting feature does not disseminate contributor information that
2 could be used to harass contributors, there is no governmental interest in applying 2 U.S.C.
3 § 438(a)(4) restrictions to CM5." Reply Brief at 51.

4 Enforcement of 2 U.S.C. § 438(a)(4) only prohibits Aristotle from selling this
5 information for commercial purposes; it does not limit any campaign's ability to use the
6 information for appropriate purposes. Congress' desire to prevent commercial use of the
7 financial disclosures is not mutually exclusive with their desire to deter corruption. As the court
8 stated in *Legi-Tech*, "...prohibiting the commercial trade of this information preserves the
9 effectiveness of the private campaign financing system by reducing the discouraging effects of
10 compelled disclosure on the willingness of individuals to finance political discourse." *FEC v.*
11 *Legi-Tech*, 967 F. Supp. 523, 533 (D.D.C. 1997)(citations omitted). The mere fact that the
12 information made public is later reproduced in a format constituting speech does not
13 automatically mean that Congress has forfeited all of its power to regulate the commercial use of
14 that information. See *Legi-Tech, supra* at 534 (citations omitted).

15 The Commission is required to make reports and statements filed with it available for
16 public inspection, except that any information copied from such reports or statements may not be
17 sold or used by any person for the purpose of soliciting contributions or for commercial
18 purposes. 2 U.S.C. § 438(a)(4). When determining whether the statute is constitutional as
19 applied to the facts of this case, or on its face, the court will look to whether, "the restriction
20 further[s] 'an important or substantial government interest unrelated to the suppression of
21 expression' and [is] 'no greater than is necessary or essential to the protection of the particular
22 governmental interest involved.'" *Legi-Tech, supra* at 532, citing *IFI, supra* at 1114. An
23 intermediate scrutiny standard applies when determining the constitutionality of the statute,

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1 because there exists a government compelled disclosure of information for a particular purpose
2 and a prohibited use of that information for other purposes. *See id.* citing *IFI, supra* at 1114
3 (because there was no pre-existing right to use another political committee's contributor lists to
4 solicit contributions, the use restriction of Section 438(a)(4) does not directly restrict a person's
5 first amendment right to solicit contributions for a political cause, and therefore, Section
6 438(a)(4) is not subject to strict scrutiny). In other words, the statute in no way restricts anything
7 but the use to which one may put the compulsorily disclosed information. *See IFI, supra* at
8 1115, citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)(the Supreme Court applied
9 only intermediate scrutiny to a restriction on the use of information that the government had
10 commanded to be disclosed). Applying an intermediate level of scrutiny to the First Amendment
11 challenge of 2 U.S.C. § 438(a)(4), the statute serves the important governmental interests of
12 protecting a political committee against losing the economic value of its contributor list merely
13 because it must be publicly disclosed and it protects contributors from unwanted solicitation.
14 *See IFI, supra* at 1116 (citations omitted). Given that the statute does not ban soliciting all
15 together, but merely requires that the data is obtained from a non-FEC source, the statute is no
16 broader than necessary to protect the important governmental interests while not chilling the
17 protected speech of third parties. *See IFI, supra* at 1118 and 1119; *see also Legi-Tech, supra* at
18 533. Beyond the question of harassment, as explained by the pertinent case law, "[w]ithout the
19 use restriction of § 438(a)(4), innumerable entrepreneurs would, ... be able freely to appropriate
20 to themselves part of the value of the contributor lists compiled by reporting political
21 committees." *IFI*, at 1117, (citations omitted).

22 The Commission's interpretation of the statute is reasonable and the regulation is fully
23 consistent with the plain meaning of the text of the statute and in accordance with Congressional

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1 intent. *See Legi-Tech*, at 530. The Commission's implementing regulation, 11 C.F.R. § 104.15
2 is also entitled to deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council,*
3 *Inc.*, 467 U.S. 837, 843 (1984); *see also National Republican Congressional Committee v. Legi-*
4 *Tech*, 795 F.2d 190, 194 (1986) ("statutes agencies administer should be interpreted by the
5 agencies before the courts interpret them" (citations omitted)). The regulation is rationally
6 related to the purpose of the statute, and accommodates the competing interest of promoting
7 disclosure of campaign contribution information with the protection of private citizens' privacy
8 and the property interest of the political committees. *See Legi-Tech, supra* at 530. The scope of
9 the restriction is no greater than necessary to protect the substantial governmental interests. *See*
10 *id.* Therefore, the statute and regulation are constitutional on their face.

11 In its Supplemental Reply Brief, Respondent makes an overly broad constitutional
12 challenge to the statute and the regulation, arguing that prohibiting Aristotle from publishing
13 FEC data is discriminatory because the media exemption allows "so-called media corporations"
14 to publish the same information. The result, Aristotle argues, is a violation of Aristotle's First
15 Amendment rights. The basis for Respondent's argument is dicta from the recent Supreme Court
16 decision in *Citizens United v. Federal Election Commission*, 558 U.S. ____ 130 S. Ct. ____ (Jan.
17 21, 2010) which states that "[t]here is no precedent supporting laws that attempt to distinguish
18 between corporations which are deemed to be exempt as media corporations and those which are
19 not." *Id.*, slip op. at 36, Supplemental Reply Brief at 6. Respondent's argument does not compel
20 dismissal of this matter for several reasons.

21 As a general matter, 2 U.S.C. § 438(a)(4) and 11 C.F.R. § 104.15 were not at issue in
22 *Citizens United*. This is significant not only because it limits the usefulness of applying the
23 language of the opinion in this matter, but also because a less stringent standard of scrutiny than

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1 that applied in *Citizens United* would apply to an examination of the constitutionality of 2 U.S.C.
2 § 438(a)(4). In *Citizens United*, the Supreme Court applied a strict scrutiny analysis because the
3 facts involved restrictions on speech, i.e., 2 U.S.C. § 441b's ban of corporations and unions from
4 using general treasury funds to make independent expenditures for speech that is an
5 "electioneering communication" or for speech that expressly advocates the election or defeat of a
6 candidate. However, the restrictions on the use or sale of FEC data for solicitation or
7 commercial purposes is not the same kind of restriction on political expression that was at issue
8 in *Citizens United*, and only an intermediate level of scrutiny would apply to a prohibition of
9 commercial use of FEC data. See *Federal Election Commission v. Legi-Tech, Inc.*, 523 F. Supp.
10 523 (D.D.C. 1997)(intermediate scrutiny applied to First Amendment free speech challenge to
11 2 U.S.C. § 438(a)(4) which generally prohibits commercial use and sale of FEC data). As a
12 result, the *Citizens United* decision does not compel a particular result in this matter. Further,
13 lower courts that have applied an intermediate level of scrutiny have upheld the constitutionality
14 of the prohibition of commercial use of FEC data. *Id.*

15 Second, Respondent's argument is further undercut by the fact that the regulation's media
16 exemption found at 11 C.F.R. § 104.15(c) does not distinguish media from non-media
17 corporations solely on the basis of their status, but rather as a factor in the overall analysis of
18 whether or not FEC data is being used for impermissible commercial purposes, or some other
19 permissible purpose. The exemption allows the use of the FEC data by media entities only if the
20 principal purpose of such communication is not to communicate contributor information for
21 solicitation or other commercial purposes—the same use restrictions that are imposed on all
22 persons by the statute and Parts (a) and (b) of the regulation. The exemption is not contained in
23 the statute itself, but rather a creature of the statute's implementing regulation. If there were no

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1 constitutional justification for treating media corporation differently in the context of 2 U.S.C.
2 § 438(a)(4), the result would be merely that the entity's media status would no longer be
3 considered as an element in the regulation's principal purpose analysis, but the remainder of the
4 analysis would remain the same – a result that does not change the outcome in this matter.

5 The courts, when analyzing the regulatory media exemption, have considered the entity
6 publishing the communication as one of many factors with respect to determining the principal
7 purpose of the communication. For example, the court found that Legi-Tech's communication
8 violated Section 438(a)(4) and did not meet the regulatory media exemption to the statutory
9 prohibition despite the fact that Legi-Tech's parent company was owned by a diversified media
10 company. *Legi-Tech* at 532 ("What matters is not who owns Legi-Tech or the nature of that
11 owner's businesses, but the principal purpose and type of communication in which the campaign
12 contribution information is used. Even a corporation that is 'an organ of the press,' . . . ,or
13 otherwise in the newspaper or multi-media business, is not entitled to compile FEC campaign
14 contributions lists for the primary purpose of a commercial sale of that information." *Legi-Tech*
15 at 532. Respondent belatedly purports that its C/V feature has a compliance purpose; however,
16 the regulation looks at the principal use of the FEC data. As discussed *supra*, the principal
17 purpose of Aristotle's sale of the FEC data in CM-5's C/V feature was for solicitation and the
18 commercial sale of its software upgrade.

19 Given that the courts have applied the regulatory media exemption equally to media and
20 non-media corporations, the *Citizens United* language cited by Respondent in its Supplemental
21 Reply Brief is inapplicable to the constitutional analysis of the statute and the Commission's
22 regulation, and the Commission should enforce the regulation.

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1 We believe that Respondent's constitutional challenge is also undercut by the facts here.
2 Its purported compliance purpose of including the FEC data in its software is directly
3 contradicted by its initial marketing and user manuals which promoted solicitation of
4 contributors based on prior donations to other committees. Moreover, the Commission provides
5 this information to campaigns for free. Therefore, Aristotle's sale of the FEC data served no
6 measurable compliance purpose and overlaps with the disclosure of the information provided for
7 free by the Commission in accordance with the Act. Last, Aristotle's argument that the C/V
8 feature deters corruption is contradicted by its characterization of the feature as difficult to use
9 and rarely used by its customers. Therefore, the statute and regulation are constitutional as
10 applied to the facts of this matter.

11 **D. The Commission's Enforcement Action Does Not Violate the Equal Protection**
12 **Clause to the Fifth Amendment**

13
14 Respondent argues that the Commission's enforcement of this action would violate the
15 Equal Protection Clause of the Fifth Amendment to the United States Constitution. In order to
16 prevail on an Equal Protection claim, Respondent must establish that similarly situated
17 individuals are being treating differently and that the differential treatment is not justified.
18 *See California Med. Association v. Federal Election Commission*, 453 U.S. 182, 200
19 (U.S. Cal 1981). In support of its claim, Respondent cites to other enforcement matters, which it
20 alleges permitted for-profit list sales and other publication of FEC data for commercial purposes.
21 Reply Brief, at 52-55, *citing to* MUR 5155 (TRKC, Inc.), MUR 6065 (PoliticalBase.com), and
22 MUR 6053 (HuffingtonPost.com). However, Respondent ignores key facts of the other
23 enforcement cases, in which the regulatory exemption applied. 11 C.F.R. § 104.15(c). Most

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1 importantly, it also ignores that it cannot, and does not claim to fit within the media exemption.

2 See MUR 5625 Probable Cause Hearing Transcript at 27.

3 In MUR 5155 (TRKC, Inc.), the Commission found reason to believe that TRKC, Inc.
4 violated 2 U.S.C. § 438(a)(4), but determined to take no further action. The facts of MUR 5155
5 are distinguishable from the facts of this case. See MUR 5155 General Counsel's Report #3,
6 dated May 3, 2006. TRKC is an Internet news and tracking service that assists media
7 organizations, corporations, trade associations, individuals and non-profit groups with data
8 collection, storing, transmission, linking, analysis and display of complex financial and political
9 information. TRKC had several Web sites that included free content and fee-based subscription
10 services. All fee-based information from the FEC was the same as that which was available for
11 free. Not only is TRKC the equivalent of a news purveyor, but because the FEC data was also
12 available through TRKC to the public without a subscription, what customers were really paying
13 for is an easier sorting of the information, the ability to sort the information themselves in a way
14 that is useful to them, and to have access to other types of non-Commission information. Given
15 all subscriber information was available for free, and not to help with solicitations, there was no
16 commercial purpose.

17 In MURs 6065/6053 the Commission found no reason to believe
18 www.Huffingtonpost.com and www.PoliticalBase.com violated 2 U.S.C. § 438(a)(4) because
19 both respondents were covered by the media exemption to the commercial use provision, and
20 neither was using FEC contributor information for commercial purposes. Respondents
21 HuffingtonPost.com and PoliticalBase.com are news and opinion websites and the principal
22 purpose for use of the FEC data was informational rather than commercial. Neither website
23 charged a fee or required users to subscribe to see the contributor information.

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1 HuffingtonPost.com accepts advertisements, but PoliticalBase.com did not at the time of the
2 Commission's decision. Both sites obtain their data from the Commission's disclosure database
3 and manipulate it to offer more ways to search it than available on the Commission website. For
4 example, both sites offer users the ability to search federal political contributions in a variety of
5 ways, including by occupation, address, employer, and name. In addition, both sites provide a
6 mapping feature, which pinpoints and displays a contributor's address and location on a map.

7 The Commission's decisions in MUR 5155 and MURs 6065/6053 are consistent with the
8 proposed recommendations in the Aristotle matter, because although TRKC, Inc. did charge
9 users for some services, the Commission data information available for a fee did not include any
10 additional information with respect to individual donors that was not also readily available on the
11 non-subscription side of the website. They merely provided the FEC contributor information and
12 let users view it without charge – this is not a commercial purpose. In contrast, in addition to the
13 commercial nature of Aristotle's business – provider of campaign management software –
14 Aristotle sold the FEC data through its software upgrade to facilitate solicitations of
15 contributions and only recently began offering a contribution look-up feature on its Web site for
16 free that contains the same data as the subscription fee-based C/V feature in CM-5.

17 Last, unlike the respondents in MURs 5155, 6065 and 6053, Aristotle marketed its product as
18 helping with solicitations, and compiles donors' aggregate contributions that can be used by
19 Aristotle's customers to help campaigns determine who the "big givers" are so that the
20 campaigns can ask those donors for the maximum amount of money that the donor has given to
21 other campaigns in the past. By contrast, the respondents in the previous MURs did not market
22 their products as solicitation assistance tools and did not aggregate donor's contributions, thereby
23 lessening the chance of solicitation based on an individual's history of giving to other

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1 campaigns. As noted previously, the respondents' communications in MURs 5155, 6065 and
2 6053 fit into the media exemption, whereas Aristotle's software product cannot.

3 **E. Aristotle International, Inc. Knowingly and Willfully Sold and Used**
4 **Individual Contributor Information Obtained from Commission Sources in**
5 **Violation of 2 U.S.C. § 438(a)(4)**
6

7 Attachment 2 is a timeline of events comparing Aristotle's activity and FEC actions in
8 relation to this matter. Aristotle did not take any corrective action with respect to its marketing
9 of the C/V feature as a solicitation tool and failure to include disclaimer warnings on its product
10 until it became aware of the Commission's draft Advisory Opinion in response to NGP's request.
11 Moreover, some marketing of the feature as a solicitation tool continued, not all sales contracts
12 contained disclaimers, the manuals were not corrected, and the fliers still contained solicitation
13 language and no disclaimer warnings after the issuance of AO 2004-24. On
14 www.internetarchive.org, we located a PowerPoint presentation on Aristotle's website as late as
15 November 2005. The marketing of the feature as a solicitation tool began in April 2004, and
16 gradually continued until completely deleted in November 2005. The PowerPoint presentation
17 appearing on Aristotle's website on November 2, 2005 continued to tout the feature as a
18 solicitation tool. Attachment 1. As a technology company, its website advertising was
19 particularly important. Aristotle did not take steps to fully rectify these actions until well after it
20 became aware that NGP filed a complaint with the FEC about this activity.

21 While the Commission should encourage new technologies, entities are proscribed by the
22 Act from commercial use of the data campaign committees must submit to the Commission.
23 Aristotle's sale of the FEC data serves no measurable compliance purpose. Given these factors,
24 we recommend that the Commission find probable cause to believe Aristotle International, Inc.
25 knowingly and willfully violated 2 U.S.C. § 438(a)(4).

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V. RECOMMENDATIONS

1. Find probable cause to believe Aristotle International, Inc. knowingly and willfully violated 2 U.S.C. § 438(a)(4);
2. _____
3. Approve the appropriate letters.

March 8, 2010
Date

Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel

K. H. M. Guith
Kathleen M. Guith
Deputy Associate General Counsel
for Enforcement

Christine C. Gallagher
Christine C. Gallagher
Attorney

Attachments:

1. PowerPoint Presentation Appearing on Aristotle's Website, November 2, 2005

ARISTOTLE

Campaigns & Events PAC & Non-PAC Organization

Integrated Fundraising Computer Link

Testimonial Support Community

5 reasons why you'll love the new

Campaign Manager 5



Only Campaign Manager 5 can tell you how much your existing contributors and supporters have given to others. Although this data is directly available from state agencies and the FEC, its reference in Campaign Manager 5 allows you to easily conform your fundraising to state and federal compliance standards.



All of your contacts are cross-referenced to Aristotle's enhanced US registered voter file. Pull up the name of any of your contacts, and you'll also get important details such as telephone number, address corrections from the post office, names of spouse or family members, party ID and vote history. This saves you thousands of dollars and many hours by keeping your database up-to-date with the most accurate information available in Aristotle's nationwide voter file.



Campaign Manager 5 gives your organization the ability to instantly accept and process unlimited MasterCard, Visa, American Express or Discover contributions without the credit checks, personal guarantees, merchant accounts or monthly fees. If you use your own credit card company accounts, Campaign Manager 5 will record and report the contributions accurately.



Fundraising, Pledge, and Event Tracking gives you a professional fundraising operation, showing exactly how much was promised, and who has delivered. Powerful predictive fundraising helps your finance team meet their goals. Integrated Web Fundraising with Affiliate Marketing (like Amazon.com) brings in contributions from like-minded supporters from out-of-state.



Send more info

Campaign Manager 5

Home

ATTACHMENT

Page 1 of 9



W2A

5★ Unconditional compliance Guarantees. Aristotle's Campaign Manager 5 is the only software program for campaigns and PACs that comes with a 100% Unconditional Guarantee of Compliance with all state and federal campaign finance disclosure laws. Skilled, professional toll-free telephone support is always available 24 hours a day 7 days a week.

For more information about this exciting new software release, Campaign Manager 5, please contact your Aristotle Sales Representative at 800-296-2747.

Privacy Policy

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WASHINGTON, DC • ATLANTA • SAN FRANCISCO

www.aristotle.com

5
Reasons
Why



Campaigns
Choose
Campaign
Manager 5

3. 19-

Reason #1: Raise More Money.

Only Campaign Manager 5 has a seamless interface to millions of detailed contribution records

Raise more money with Campaign Manager 5.

Summary	Personal Pledge	Call Log	Report
Budget: \$1000.00 Budget: \$1000.00 Budget: \$1000.00	Cash Date \$1000.00 [TOTAL]	Fund/Number Target: Budget: Budget:	Budget: \$1000.00 Budget: \$1000.00 Budget: \$1000.00

Reason #2: Information is Power.

Campaign Manager 5
integrates information
from the highly accurate
Aristotle US Registered
Voter File.

This tells you the birthday,
phone number, party ID
or demographics of
records in your
database instantly.

Updated monthly by the Post
Office, bad addresses
are a thing of the past.

Now your software and voter
file are working
together.

A complete solution.

One click access to information from
the US Voter File.

The screenshot displays the Campaign Manager 5 software interface. At the top, there's a header with 'Campaign Manager 5' and 'Aristotle US Registered Voter File'. Below this, a search bar contains '10044263888'. The main area is a table with columns: 'Name', 'Address', 'City', 'State', 'Zip', 'Party', 'Age', 'Gender', 'Race', 'Religion', 'Education', 'Income', 'Home Phone', 'Cell Phone', 'Fax', 'Email', 'Print Date', 'Print'. The table is populated with several rows of voter data. On the right side, there are buttons for 'Select' and 'Cancel'. Below the table, there's a section for 'Voter Resources' with links like 'Voter File', 'Voter File History', 'Voter File Search', etc. At the bottom, there's a footer with 'Copyright 1999 Aristotle US Registered Voter File'.

Sticking to the Plan.

[illegible]

Reason #4:

Pre-approved for Credit Cards.

Campaign Manager 5 is the only FEC-approved software program pre-approved to accept American Express, MasterCard, Discover & Visa contributions.


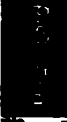


Immediately accept contributions made with a credit card without any bank paperwork or guarantees.

Online, over the phone, in the mail or at events.

Then pay your campaign bills on a monthly giving plan to increase your cash flow predictably.

There's no better way to ensure there's money in the bank for the final push.

Credit Card Processing

Name on Card: Charles Harris
Amount: \$1000.00
Frequency: ☒ Once ☐ Monthly

Expires: 7/1/2000 - 12/31/2000

Billing Address: ☐ Home ☒ Work ☐ Mail

☐ Carcareville ☐ GA ☐ 30120

☐ Discover ☐ Close

Reason #5:

100% Compliance Guaranteed.

Aristotle is the only company to back its products with a 100% compliance guarantee.

Friendly customer support is always available, toll-free, 24 Hours a day, 7 days a week.

One phone call gets you an immediate answer from a real person knowledgeable in State and Federal reporting.

That's why our customer service is rated #1 by campaigns, PAC's and grassroots groups.



5 Reasons Campaigns Choose Campaign Manager 5.

1. Raise More Money.
2. Information is Power.
3. Sticking to the Plan.
4. Pre-Approved for American Express, MasterCard, Visa and Discover Contributions.
5. 100% Guaranteed.



AMERICAN EXPRESS
CREDIT CARD